

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LARRY J. ERICKSON and
BETTY L. MOORE,

Debtors.

BAP No. KS-11-005

CHRISTOPHER J. REDMOND,
Trustee,

Appellant,

Bankr. No. 10-20953
Chapter 7

v.

OPINION*

LARRY J. ERICKSON and BETTY L.
MOORE,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before CORNISH, Chief Judge, MICHAEL, and ROMERO, Bankruptcy Judges.

CORNISH, Chief Judge.

The Chapter 7 trustee appeals the bankruptcy court's order overruling his objection to a debtor's claimed exemption of life insurance proceeds and denying his motion for turnover. Having reviewed the record and applicable law, we affirm the bankruptcy court's order allowing debtor's exemption. However, our

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

affirmance relies on grounds other than those stated by the trial court.¹

I. BACKGROUND FACTS

The facts of this case are undisputed.² Husband and wife Larry J. Erickson (“Erickson”) and Betty L. Moore (“Moore”) (collectively “Debtors”) filed a petition for Chapter 7 relief on March 30, 2010. At the time the petition was filed, Erickson owned several insurance policies on his life with respect to which Moore was the designated beneficiary.³ Debtors neither scheduled the life insurance policies as assets, nor claimed them as exempt. Erickson died on May 24, 2010, within 180 days of filing the petition, thereby implicating 11 U.S.C. § 541(a)(5)(C),⁴ which operates to include the life insurance proceeds into Moore’s bankruptcy estate.⁵

Moore did not notify the Chapter 7 trustee, Christopher J. Redmond (“Trustee”), of Erickson’s death, or of her receipt of the life insurance proceeds as beneficiary. Trustee learned of these events from an interested third-party creditor. Trustee then sent Debtors’ counsel a letter dated July 15, 2010,

¹ Our analysis here of the issues differs from that of the bankruptcy court. However, an appellate court is “free to affirm . . . on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon” by the trial court. *Griess v. Colo.*, 841 F.2d 1042, 1047 (10th Cir. 1988) (internal quotation marks omitted).

² The following summary is taken primarily from the bankruptcy court’s *Order Denying Trustee’s Motion to Compel Turnover of Property and Overruling; Denying Trustee’s Objections to Portions of Debtors’ Amended Exemptions; And Directing Debtor to Pay Certain Attorney Fees and Expenses (“Appealed Order”)*, in Appellant’s Amended Appendix, filed March 9, 2011, (“Appellant’s App.”) at 90.

³ All of the policies were term life insurance policies and had no cash value.

⁴ Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

⁵ Although the general rule in Chapter 7 bankruptcy is that property acquired after the filing of the petition is not property of the estate, § 541(a)(5) brings into the estate certain types of property the debtor receives, or becomes entitled to receive, within 180 days after the petition date, including life insurance proceeds.

requesting information about the life insurance policies as well as an accounting of monies received by Moore. Debtors' counsel responded to Trustee by letter dated July 26, 2010, disclosing the existence of two life insurance policies, acknowledging Moore had received the proceeds of those policies, and stating Moore had used the proceeds to pay off the note and mortgage on her home.

On September 1, 2010, Moore amended her Schedules B and C, listing three life insurance policies as personal property, and claiming the proceeds thereof as exempt.⁶ Moore claimed two of the policies exempt under Kansas Statute § 60-2313(a)(7),⁷ which exempts any interest in any policy of insurance upon a person's life exempt from process pursuant to Kansas Statute § 40-414.⁸ Moore claimed the other policy exempt under Kansas Statute § 60-2308,⁹ which exempts pensions and benefits received from qualified retirement plans. Trustee then objected to Moore's claimed exemptions under Kansas Statute § 60-2313,¹⁰ and filed a motion for turnover with respect to the insurance proceeds.¹¹ Moore

⁶ Erickson owned three insurance policies on his life and Moore was the designated beneficiary of all three: 1) a State of Kansas Policy which paid proceeds of \$15,000; 2) a Farm Bureau Policy which paid proceeds in the amount of \$125,698.96; and 3) a Minnesota Life Policy as KPERS (Kansas Public Employee Retirement System) benefits which paid proceeds of \$40,500.35. *See Amended Schedules, in Appellant's App. at 48-54; Appealed Order at 4, in Appellant's App. at 93.*

⁷ Kan. Stat. Ann. § 60-2313(a)(7) (1998).

⁸ Kan. Stat. Ann. § 40-414 (1988).

⁹ Kan. Stat. Ann. § 60-2308 (2002).

¹⁰ *Objection to Debtor's Claim of Exemptions, in Appellant's App. at 78.* The Trustee's objection refers to only the State of Kansas and Farm Bureau Policies, but not the Minnesota Life Policy.

¹¹ *Motion to Compel Turnover of Bankruptcy Estate Property, in Appellant's App. at 55; Supplemental Motion to Compel Turnover of Property of the Bankruptcy Estate, in Appellant's App. at 82.* The Trustee's first motion for turnover refers to the Farm Bureau Policy and the Minnesota Life Policy. The Trustee's supplement to the motion for turnover refers to the State of Kansas Policy.

filed various responses,¹² and the bankruptcy court set a hearing on the matter for December 15, 2010.

At the hearing, Trustee argued Moore did not have an exemptible interest in the life insurance policies as of the petition date, and that the insurance proceeds came into the bankruptcy estate pursuant to § 541(a)(5)(C) which supercedes any applicable state law.¹³ Further, Trustee argued Kansas Statute § 40-414 did not exempt the proceeds paid to Moore.¹⁴ Following the hearing, the bankruptcy court entered an order overruling Trustee's objection to Moore's claimed exemptions of the life insurance proceeds, and denying Trustee's motion for turnover.¹⁵ In its order, the bankruptcy court stated it need not determine the merits of Trustee's argument that § 541(a)(5)(C) supercedes Kansas Statute § 40-414

because the Court finds that Debtor Betty L. Moore had a separate and independent interest in the Insurance Policies and the proceeds thereof that could be exempted by the Debtor Betty L. Moore as of the Petition Date.¹⁶

Further, the bankruptcy court ordered Moore to reimburse Trustee's attorney fees and expenses in the amount of \$2,000 because she failed to timely disclose the death of Erickson, the existence of the insurance policies, and payment of the

¹² See *Objection to Motion to Compel Turnover of the Bankruptcy Estate Property*, in Appellant's App. at 73; *Objection to Supplemental Motion to Compel Turnover of the Bankruptcy Estate Property*, in Appellant's App. at 85.

¹³ *Transcript of Proceedings held on December 15, 2010*, at 5, in Appellant's App. at 104.

¹⁴ *Id.* at 6, in Appellant's App. at 105.

¹⁵ *Appealed Order*, in Appellant's App. at 90.

¹⁶ *Id.* at 5, in Appellant's App. at 94.

proceeds.¹⁷ Trustee timely appealed the bankruptcy court's order to this Court.¹⁸

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.¹⁹ Neither party elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have therefore consented to appellate review by this Court.

A decision is considered final “if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”²⁰ A bankruptcy court's order allowing a debtor's claimed exemption and denying a trustee's motion for turnover is final for purposes of appellate review.²¹

III. STANDARD OF REVIEW

The facts of this case are undisputed. Trustee appeals the bankruptcy court's conclusion that Moore had an exemptible interest in the life insurance policies as of the petition date under Kansas law. Thus, this appeal presents only

¹⁷ *Id.*

¹⁸ Also pending before this Court are two motions filed by Debtors: 1) a *Motion to Take Judicial Notice of Record in Other Related Action*, filed March 16, 2011 (appointment of Moore as special administrator in Erickson's probate case), referred to this panel by order dated March 30, 2011; *see Docket No. 36*; and 2) a *Motion Requesting Leave to File Surreply to Appellant's Reply Brief*, filed on April 18, 2011, referred to this panel by order dated April 27, 2011; *see Docket No. 46*. The Court hereby denies both motions as unnecessary to our decision.

¹⁹ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

²⁰ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

²¹ *In re Smith*, 401 B.R. 487, 488 (10th Cir. BAP 2009) (citations omitted) (order denying exemption is final for appeal purposes); *In re Graves*, 396 B.R. 70, 72 (10th Cir. BAP 2008) (order denying motion for turnover is final for appeal purposes).

legal issues for determination. Legal questions are reviewed *de novo*.²² *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.²³

IV. ANALYSIS

On appeal, Trustee first argues the bankruptcy court incorrectly concluded Moore “had a separate and independent interest in the Insurance Policies and the proceeds thereof that could be exempted by the Debtor Betty L. Moore as of the Petition Date.”²⁴ We agree. Such a conclusion is not supported by Kansas law.

As of the petition date, Erickson, the insured, was still living. Therefore, Moore's interest in the life insurance policies was limited to that of a designated beneficiary subject to divestment. The Kansas Supreme Court has ruled that “[a] beneficiary has only an inchoate right to the proceeds of a policy, subject to being divested at any time during the lifetime of the insured, by transfer, assignment, or change of beneficiary.”²⁵ As a result, Moore had only an expectancy and not a legal or equitable interest in the life insurance policies that she could exempt as

²² *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

²³ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

²⁴ *Appealed Order at 5, in Appellant's App.* at 94. In his opening brief, Trustee

voluntarily concedes that the proceeds of the KPERS funds in the amount of \$40,500.35 from the policy with Minnesota Life Insurance Company, policy number 0032869 under which Debtor Larry J. Erickson was the owner and insured; and Debtor Betty L. Moore at the time of the Petition Date did not become property of the bankruptcy estate under 11 U.S.C. § 541(a)(5). *See In re Hall*, 394 B.R. 582, 592 (Bankr. D. Kan. 2008), *aff'd*, 441 B.R. 680 (10th Cir. BAP 2009). Therefore, the Trustee withdraws his objection to that claimed exemption.

See Brief of Appellant at 3 n.5. Accordingly, although this Court does not understand the Trustee's stated basis for withdrawing his objection to exemption of the third policy, this opinion addresses only the exemption of the proceeds from the two remaining life insurance policies.

²⁵ *Nicholas v. Nicholas*, 83 P.3d 214, 223 (Kan. 2004) (quoting *Wear v. Mizell*, 946 P.2d 1363, 1366 (Kan. 1997)).

of the petition date. Notwithstanding the bankruptcy court's incorrect conclusion in this regard, as discussed below, Moore can nevertheless exempt the proceeds under Kansas statutory law.

Kansas is an opt-out state, meaning a debtor's exemptions are determined by state law, subject to applicable Bankruptcy Code limitations.²⁶ Many of Kansas' exemptions, including the exemption regarding life insurance policies, are set forth in § 60-2313 of the Kansas Statutes, which provides in pertinent part:

(a) Except to the extent otherwise provided by law, every person residing in this state shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state:

...

(7) Any interest in any policy of insurance or beneficiary certificates upon a person's life exempt from process pursuant to K.S.A. 40-414 and amendments thereto.²⁷

Section 40-414 of the Kansas Statutes provides in pertinent part:

(a) If a life insurance company or fraternal benefit society issues any policy of insurance or beneficiary certificates upon the life of an individual and payable at the death of the insured, or in any given number of years, to any person or persons having an insurable interest in the life of the insured, ***the policy and its reserves, or their present value, shall inure to the sole and separate use and benefit of the beneficiaries named in the policy and shall be free from:***

- (1) The claims of the insured or the insured's creditors and representatives;
- (2) the claims of any policyholder or the policyholder's creditors and representatives, subject to the provisions of subsection (b);
- (3) all taxes, subject to the provisions of subsection (d); and
- (4) ***the claims and judgments of the creditors and representatives of any person named as beneficiary in the***

²⁶ See 11 U.S.C. § 522(b)(2); Kan. Stat. Ann. § 60-2312 (1986).

²⁷ Kan. Stat. Ann. § 60-2013(a)(7) (1998).

*policy of insurance.*²⁸

This statutory language has been interpreted by the Kansas Supreme Court and Kansas bankruptcy courts to protect life insurance proceeds paid to a beneficiary.

As most recently stated by a Kansas bankruptcy court:

Kansas law exempts the proceeds of a life insurance policy, whether they be cash or surrender value in the hands of the insured or proceeds in the hands of the beneficiary. Kan. Stat. Ann. § 40-414(a)(4) expressly exempts the “beneficiary’s interest” from any claims of his creditors. Kansas courts have long held that proceeds of an insurance policy in the hands of a beneficiary or deposited in the beneficiary’s bank account retain their exempt character. Although the insurance exemption statute has been amended from time to time since 1902, courts sitting in Kansas have continually held that proceeds held by beneficiaries remain exempt.²⁹

Trustee argues § 541(a)(5)(C) somehow “supercedes” this Kansas exemption statute.³⁰ This argument is completely contrary to § 522(b) which provides that debtors are entitled to certain exemptions *notwithstanding* § 541. Accordingly,

²⁸ Kan. Stat. Ann. § 40-414(a) (1988).

²⁹ *In re Tessendorf*, 449 B.R. 793, 794 (Bankr. D. Kan. 2011) (emphasis added) (citing *Emmert v. Schmidt*, 68 P. 1072 (Kan. 1902)) (proceeds of insurance deposited in beneficiary’s bank exempt from garnishment by judgment creditor); *In re Douglas*, 59 B.R. 836 (Bankr. D. Kan. 1986)). See also *In re Hall*, 394 B.R. 582, 593 (Bankr. D. Kan. 2008).

³⁰ Section 541 describes property of the estate and provides in pertinent part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

...

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

...

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

11 U.S.C. § 541(a)(5)(C).

Trustee's argument that § 541 supercedes the Kansas statutory exemption for life insurance proceeds has no merit, and as pointed out by Moore, has been previously rejected by another Kansas bankruptcy court.³¹ Although § 541(a)(5)(C) operates to bring the life insurance proceeds into Moore's bankruptcy estate because she became entitled to them within 180 days of filing her petition, she may still claim them as exempt pursuant to Kansas Statutes § 40-414 and § 60-2313.

On appeal, Trustee also argues that even if Kansas Statute § 40-414 is potentially applicable, Moore still may not exempt the life insurance proceeds because at the time she amended her schedules to claim exemption, she no longer had any interest in the property she claimed as exempt. Trustee argues this is because after receiving the proceeds and prior to amending her schedules, Moore used the proceeds to pay off the mortgage on her home. However, having carefully reviewed the Trustee's pleadings and the transcript of the hearing, we decline to address this argument because Trustee did not first present it to the bankruptcy court.

Generally, "a federal appellate court does not consider an issue not passed upon below."³² The rule is not absolute, but the exceptions are rare, and the decision is primarily left to the discretion of the appellate court.³³ The Tenth Circuit has held "[t]he failure to raise the issue with the trial court precludes review except for the most manifest error," and exceptions are "generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question of

³¹ See *In re Foth*, No. 06-10696, 2007 WL 4563434 (Bankr. D. Kan. Dec. 21, 2007) (included in Brief of Appellees at 20, 25).

³² *In re C.W. Mining Co.*, 625 F.3d 1240, 1246 (10th Cir. 2010) (quoting *Singleton v. Wulff*, 428 U.S. 106 (1976)).

³³ *Id.*

law to prevent a miscarriage of justice.”³⁴ Such circumstances are not present in this appeal, and therefore we decline to address the Trustee’s argument for the first time on appeal.

Even if we were to address the Trustee’s argument that Moore is prohibited from exempting the life insurance proceeds because she no longer had any interest in them when she amended her schedules, he would have an uphill battle. The Kansas Supreme Court has expressed “[t]he general rule is that exemption laws are to be liberally construed in favor of those intended to be benefited and favorable to the objects and purposes of the enactment.”³⁵ The purpose of exempting life insurance is to enable an individual to provide a fund after his death to support his family, which will be free from the claims of creditors, so that his family will not become dependent on society. The intended purpose of the exemption was served when Moore used the insurance proceeds from the policies on her husband’s life to pay off the note and mortgage on her home.³⁶

³⁴ *Id.* (quoting *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991)).

³⁵ *Miller v. Keeling*, 347 P.2d 424, 427 (Kan. 1960).

³⁶ Further, we note that the cases Trustee cites in his Reply Brief to support his argument appear to have little or no application to the facts of this case. *See* Appellant’s Reply Brief at 8 n.7, citing *In re Sloma*, 43 F.3d 637, 640 (11th Cir. 1995) (debtor could not exempt an annuity that he assigned as security for a loan seven years prior to filing bankruptcy); *In re Lampe*, 278 B.R. 205, 212 (10th Cir. BAP 2002) (debtor-wife had ownership interest in farming equipment sufficient to support separate tools of the trade exemption); *In re Cohen*, 263 B.R. 724, 726 (Bankr. D. N.J. 2001) (debtor-wife could not claim exemption in residence because she did not have any ownership interest though she had right to joint possession as long as she was married). *See also* Reply Brief at 9 n.8, citing *In re McLain*, 516 F.3d 301, 312 (5th Cir. 2008) (if undisclosed pre-petition funds were used to make premium payments on life insurance policy, the trustee might have a property interest in some portion of the proceeds under Texas law); *In re Gandara*, 257 B.R. 549, 552 (Bankr. D. Mont. 2000) (debtor’s unauthorized postpetition transfer of funds to county attorney’s office and then to creditor, in return for dismissal of bad-check prosecution, did not strip funds of their character as property of the estate and could be avoided); *In re Tuttle*, 698 F.2d 414, 418 (10th Cir. 1983) (property voluntarily transferred out of an estate and later recovered by the trustee cannot then be exempted by the debtor).

V. CONCLUSION

Although the life insurance proceeds from the policies on Erickson's life were brought into beneficiary Moore's bankruptcy estate pursuant to § 541(a)(5)(C), Moore is entitled to exempt them pursuant to Kansas Statutes § 40-414 and § 60-2313. Therefore, the bankruptcy court's order denying Trustee's objection to Moore's claimed exemption of the life insurance proceeds and Trustee's motion for turnover of the same is hereby **AFFIRMED**.